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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 438

WINSTON P. BOYER and GEORGE T. BOYER,
Appellants,

v.

RICHARD L. ELKINS and JAMES A. BULLOCK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS

COME NOW the appellees, Richard L. Elkins and James A. Bullock, and respectfully move this Honorable Court, pursuant to the terms and provisions of Rule 16 of the Supreme Court Rules, to dismiss the appeal of Winston P. Boyer and George T. Boyer, appellants, from the judgment of the Supreme Court of Colorado, bottomed upon its *en banc* decision of March 9, 1964, as reported in 390 P.(2d) 460 (not yet reported in the Colorado reports); and as grounds therefor would show:

1. That on March 9, 1964, the Supreme Court of Colorado, by its *en banc* opinion, affirmed a judgment of the District Court of the City and County of Denver, State of Colorado, pursuant to a verdict of a jury, by virtue of which the appellees were awarded damages for personal injuries suffered as the result of an assault and battery committed upon them by the appellants while in the discharge of appellees' official duties as police officers of the City and County of Denver; that, in addition to the compensatory damages awarded, the jury verdict and judgment of the Trial Court based thereon included exemplary damages and, in accordance with Chapter 77, Article 9, Section 3, Volume 4, page 96, *Colorado Revised Statutes*, 1953, execution against the body of each of the appellants was ordered "for a period not to exceed one year or until further order of Court or until the amount of the judgment has been paid."

2. That, after the affirmance of the judgment, the appellants, pursuant to and in accordance with Rule 118 of the Colorado Rules of Civil Procedure (Volume 1, page 116, *Colorado Revised Statutes*, 1953), caused to be filed their joint Petition for Rehearing in the manner and form reproduced as Appendix "B" at pages 36 to 39 of the Jurisdictional Statement. On April 6, 1964, the Petition for Rehearing was denied, and the judgment became final.

3. That Notice of Appeal to this Court was duly and regularly filed with the Clerk of the Supreme Court of the State of Colorado on July 2 1964, by virtue of which the jurisdiction of this Court was sought to be invoked for review of the judgment of the State Court, under and pursuant to Title 28, *U.S.C.* 1257(2).

4. That, pursuant to Rule 15 of the Supreme Court

Rules, the Jurisdictional Statement of the appellants was served upon the appellees on August 27, 1964.

5. That said Jurisdictional Statement and the Record submitted *haec verba* demonstrates:

(a). That the appeal does not present a substantial federal question; but, on the contrary, the judgment of the State Court rests entirely upon an adequate and complete non-federal basis.

(b). That the purported federal question sought to be reviewed, as it relates to the constitutionality of the "arrest-without-warrant" statute of the State of Colorado and the ordinance of the City and County of Denver (Chapter 39; Article 2, Section 20, Volume 8, page 567, *Colorado Revised Statutes*, 1953, and Section 211.1-2, page 124 of the *Revised Municipal Code* of the City and County of Denver, reproduced at page 3 of the Jurisdictional Statement) was not timely, properly or adequately raised.

(c). That the constitutionality of the "arrest-without-warrant" statute and ordinance was not expressly passed on by the Supreme Court of Colorado.

6 That, with respect to the constitutional challenge to the "body execution" statute (Chapter 77, Article 9, Section 3, Volume 4, page 96, *Colorado Revised Statutes*, 1953, reproduced at pages 3 and 4 of the Jurisdictional Statement), this appeal is premature and does not, under the Record and circumstances of this particular case, raise any justiciable issue and for all intents and purposes is moot.

7. That the judgment of the Supreme Court of Colorado is bottomed solely, fully and conclusively upon a factual basis, to wit: An aggravated assault and battery, which presents a matter only of local concern, determined after a full, fair and complete trial of all of the issues presented by the pleadings, the evidence, and the pertinent rules of law pertaining within Colorado.

8. With respect to the allegations of Paragraph 5(a) and Paragraph 7 of this Motion to Dismiss, the factual basis in support thereof may be found succinctly stated by Mr. Justice Moore in the *en banc* decision of the Supreme Court of Colorado, reproduced as Appendix "A" in the Jurisdictional Statement, and particularly at pages 21 to 24, inclusive, thereof, and incorporated herein by reference.

9. With respect to the allegations of Paragraph 5(b) of this Motion to Dismiss, the factual basis in support thereof may again be found in the opinion of Mr. Justice Moore, reproduced as Appendix "A" in the Jurisdictional Statement, and particularly at pages 25 and 29 thereof, which, by reference, is incorporated herein. Further, neither the pleadings, which framed the issues to be tried, nor the appellants' motion and amended motion for new trial make any challenge whatsoever to the validity or constitutionality of the "arrest-without-warrant" statute and/or ordinance; that appellants failed to give the required notice of such challenge to the Attorney General of Colorado and/or the Mayor or City Attorney of the City of Denver, as is required by Rule 22 of the Rules of the District Court prevailing in and for the Second Judicial District (City and County of Denver), State of Colorado, reproduced as Appendix "1" to this Motion and

incorporated herein by reference; that the specific statute now challenged was used and employed by the appellants in their opening brief filed in the Supreme C urt of Colorado in support of their contentions, there made, that the legality of the arrest was solely a jury question upon conflicting evidence, as appears in their Summary of the Argument, contained at pages 31 and 32 of said brief, reproduced here as Appendix "2" and incorporated herein by reference; and that the challenge to the validity of the "arrest-without-warrant" statute and dinance was raised, for the first time, in paragraph No. 1 of appellants' Petition for Rehearing, reproduced as Appendix "B" in the Jurisdictional Statement and incorporated herein by reference.

10. With respect to the allegations of Paragraph 5(c) of this Motion to Dismiss, a physical examination of the opinion of the Supreme Court of Colorado, reproduced as Appendix "A" to appellants' Jurisdictional Statement, will reveal that the State Court did not expressly pass on the validity or the constitutionality of either the challenged "arrest-without-warrant" statute or ordinance.

11. With respect to the allegations of Paragraph 6 of this Motion to Dismiss, the Orders of Mr. Justice Byron R. White of May 8, 1964, reproduced herein as Appendixes "3" and "4" and incorporated herein by reference, are offered as supporting, factually, the prematureness and mootness of the challenge to the validity of the "body execution" statute (Chapter 77, Article 9, Section 3, *Colorado Revised Statutes*, 1953); that, pursuant to such Orders, George T. Boyer did post a good and sufficien bond with the Clerk of the Supreme Court of Colorado (after its app oval by the justices thereof), conditioned

upon the payment of the judgment which is the subject of this application for review (see admissions in Jurisdictional Statement at page 17). With respect to Winston P. Boyer, the record affirmatively establishes that he failed to file his "affidavit as to such inability" to provide the requisite bond; and, by reason of the premises, the Record is destitute of a showing of his inability to satisfy the judgment herein without application of the statute.

12. That the statutes and ordinance now the subject of challenge are in every respect valid and constitutional, as a proper exercise of the police powers of the State and Municipality.

Respectfully submitted,

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ARGUMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS

The argument that follows and the citation of authorities in support thereof will follow the same sequence as the grounds alleged, with their subdivisions encompassed within Paragraphs 5 to 12, inclusive, of the Motion to Dismiss.

I. THE APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

It is now settled law that the Supreme Court of the United States lacks jurisdiction to review a decision of a State Supreme Court where, as here, the state decision may be justified on an adequate non-federal basis. *Ellis v Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231; *Stembridge v. State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 837, 96 L.Ed. 1130; *Lynch v. People of New York, et al.*, 293 U.S. 52, 54, 55 S.Ct. 16, 17, 79 L.Ed. 191; *Rescue Army, et al. v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 67 S.Ct. 1409, 1420, 91 L.Ed. 1666.

The present challenge is to the validity of Colorado's "arrest-without-warrant" statute (Chapter 39, Article 2, Section 20, Volume 8, page 567 *Colorado Revised Statutes*, 1953), as well as t the municipal ordinance upon the same subject (Section 211.1-2, page 124 of the *Revised Municipal Code* of the City and County of Denver). A comparison of the pertinent state statute with the city ordinance reveals that the two are co-extensive in permitting arrests, by officers, for offenses committed in their presence. With respect to offenses committed out of their presence, the statute requires (a) that a "criminal of-

fense" has, in fact, been committed; and (b) that the arresting officer has "reasonable grounds for believing" that the person to be arrested has committed it, whereas the ordinance requires but one element — that the officer have reasonable grounds to believe that the person to be arrested has committed a crime.

It is now established that the violation of a municipal ordinance is a "criminal offense" in Colorado. *Geer v. Alanez*, 138 Colo. 177, 331 P.(2d) 269; *Canon City v. Merris*, 137 Colo. 169, 323 P.(2d) 614; *Zerobnick v. Denver*, 139 Colo. 139, 337 P.(2d) 11.

The power to arrest without warrant, as it pertained under the common law, may be constitutionally extended and broadened by statutory enactment. *Burroughs v. Eastman*, 101 Mich. 468, 59 N.W. 817; *Spurlock v. U. S.* (9th Cir., 1961), 295 F.(2d) 387. Illustrative is the enlargement of authority to arrest without warrant for violation of motor vehicle codes by state highway patrolmen. *Commonwealth v. Charles*, 114 Pa. S. 473, 174 Atl. 907.

Legislative enactments dealing with arrests without warrants are a proper exercise of the police powers of states and municipalities, since they are designed to promote public health, safety and morals; and, accordingly, their interpretation by the courts are to be gauged by state standards and policies (*U. . v. Bennett*, 209 F. Supp. 687; *Miller v. Texas*, 152 U.S. 512, 38 L.Ed. 534, 14 S.Ct. 675) under the established facts of the particular case. *Rescue Armg. et al. v. Municipal Court of Los Angeles, supra.*

Fortunately, the guideposts for the determination of the problem in the instant case have been supplied in

Walker v. Tucker, 131 Colo. 198, 280 P.(2d) 649, where it is stated:

> "Public policy, regardless of statute, requires and supports the maintenance of an authorized peace officer in an incorporated town. This is necessary for the maintenance of public safety, health and the preservation of property, and to hold that a peace officer, be he policeman, town marshal, constable or sheriff, must stand by and witness the violation of a town ordinance • • • and be impotent under the circumstances and permit an offender to do the damage and escape, maybe into parts unknown, without resisting the violation and apprehending the violator, would be a travesty upon justice and the police powers inherent in any municipal corporation. • • •
>
> "Ordinances such as are here involved are enacted for the preservation of peace, good order, and public convenience and protection of property rights. For a town or city to tolerate the destruction of its property because its duly authorized peace officers are unauthorized to stop the violation or apprehend the violator, until such a time as a warrant could be procured through the time-consuming processes, is unthinkable. The failure of our legislature to provide for such instances does not abrogate the inherent right of a municipality, or a town marshal, to discharge his full duty to prevent a violation of an ordinance as here involved, or to arrest any person violating same in his presence, and we believe, and so hold, that this ruling should apply even though the violation of the ordinance here involved does not amount to a breach of peace."

It is the position of the appellees that the lawfulness of the arrest of the appellants may be justified not only under the specific provisions of the challenged statute or ordinance, but also in accordance with the common law of the state, the authority inherent in the nature of the office of the appellees, and under the public policy, as expressed and announced in the *Walker* case, *supra*.

For the purposes of demonstration, we set out the determined facts, established by the Record and announced in the opinion of Mr. Justice Moore:

> "On the morning of March 10, 1958, Winston P. Boyer, who resides in Moab, Utah, together with his brother George T. Boyer and their uncle Roy E. Spicer, traveled from Denver to the Air Force Academy near Colorado Springs, Colorado. There by prearrangement they met a truck driver who had been engaged to do some hauling for them. Certain material was selected at the Academy which was to be used by Winston Boyer in a contemplated house building project at Moab, Utah. These four men spent the day in selecting the material which they desired and loaded it on the truck. Their labors were completed late in the afternoon, after which they all proceeded from the Academy to a weighing station, where they were delayed by authorities because of some overloading of the truck. The truck finally cleared the weighing station at about 7:00 P.M. The Boyers and Spicer then proceeded toward Denver via the Valley Highway in the Boyer sedan with George Boyer driving, and, arriving at Castle Rock they stopped for dinner at a restaurant with a connecting bar, at which time, before and during their meal, Winston and Spicer

each consumed three drinks of whiskey. George Boyer had two similar drinks before dinner, which he consumed within a period of fifteen minutes. Winston and Spicer consumed their drinks within forty minutes. They had arrived at Castle Rock at 8:00 P.M. and left for Denver at 9:30 P.M. They proceeded from Castle Rock toward Denver until they arrived at a tavern called the "Flame" where they stopped and each consumed an additional quantity of whiskey. The party then drove about twelve miles to Writer's Manor on South Colorado Boulevard in Denver where they arrived at approximately 11:30 P.M. Spicer wanted to cash a check but was disappointed in doing so because of the absence of a party he knew who he expected would approve his check. The three of them then proceeded into the bar where George admittedly attempted twice to serve himself by reaching over the bar in an effort to grab a bottle of liquor. George admits that on one such attempt he did in fact succeed in placing a small quantity of liquor in his coffee cup. According to the testimony of the bartender there were three attempts to take whiskey from behind the bar, and on each of the occasions George succeeded in getting an ounce or an ounce and one-half of whiskey.

Winston, George and Spicer were sitting at the west end of the bar which was tended by a Mr. Woodrow Wilson. Coffee was first served the Boyers and a whiskey highball to Spicer. After the Boyers consumed their coffee George reached over the bar for a bottle of liquor and according to Wilson began pouring some of its contents into the cup. The taking of any liquor at that time was disputed by the Boyers.

Wilson testified that George took about one and one-half ounces of liquor. It is the undisputed testimony of George that the 'bartender came over and took the bottle from me,' and said 'Leave the liquor alone.' The bartender replaced the bottle in the well back of the bar from where it was taken. George then left the bar and went to the coffee shop for more coffee. After consuming the second cup of coffee he again reached over the bar and took the same bottle. He admits that at that time he took a small amount of liquor. Again the bartender took the bottle away from him and according to Wilson he said to him, 'I want you to leave the liquor alone.' Wilson then reported those incidents to Carl Harthun, the other bartender who was also in charge of the place. Harthun exchanged stations with Wilson. Harthun again observed George reaching for the bottle and saw him again pour whiskey into his coffee cup. The Boyers deny taking any whiskey at that time; at any rate Harthun again took the bottle from George and told him: 'We serve the customers, the customers don't serve themselves.' George then left for another cup of coffee, followed by Harthun who said, 'I wish that you and your party would leave.' George's answer, according to Harthun, was: 'You damn bartenders won't give us any service, and we have to serve ourselves.' Harthun then went into the lobby and telephoned for police protection.

"After the conversation with Harthun, George again left the bar for a fourth cup of coffee and upon his return noticed two policemen talking with Harthun. These police officers were the plaintiffs Elkins and Bullock and were in full uniform. They had a

five minute conference with Harthun who related what had happened. The record shows that Elkins and Bullock then approached the Boyers; that they informed them that the management wanted them to leave and asked them to finish their coffee and go. The remarks of George and Winston to the officers can well be characterized as 'smart-alecky', insolent and somewhat defiant, and quite within the realm of what one might hear from an inebriate. During this time, although denied by the Boyers, one of them swung at Elkins, and Elkins started to remove them from the place, at which time the Boyers demanded to know what the charges were. The reply of the officers was that there were no charges as yet but there would be unless they left willingly. George Boyer had to be handcuffed, and ultimately, after a fight in which Elkins was kicked into unconsciousness and Bullock was knocked into insensibility, the two Boyers were subdued upon the arrival and with the help of several other policemen. One of the Boyers was placed in the patrol car and the other in another police cruiser and taken to the police station. There is an abundance of testimony that both Boyers were inebriated and fighting drunk, that they were loud, noisy, profane and were disturbing the peace in a public place. Elkins and Bullock were taken to the hospital, both with serious injuries."

It has been held that an offense is committed "in the officer's presence" when he is cognizant of an illegal activity by the use of his senses. *Harris v. State*, 216 Miss. 895, 63 S.(2d) 396; *Burgess v. People*, 170 Cal. App.(2d) 36, 338 P.(2d) 524. The use of an officer's senses includes reliance upon information supplied to him by another.

Draper v. U. S., 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.(2d) 327; *State v. Hoover*, 219 Ore. 288, 347 P.(2d) 69

The circumstances which give rise to an officer's action must be viewed entirely from his standpoint, as the facts then appear to him in the light of his experience and background as an officer. *Van Fleet v. West American Ins. Co.*, 5 Cal. App.(2d) 125, 42 P.(2d) 378; *Burton v. McNeill*, 196 S.C. 250, 13 S.E.(2d) 10; *Griffin v. State*, 200 Md. 569, 92 A.(2d) 743; *Goodwin v. State*, 149 Tenn. 47, 257 S.W. 80; *Forsythe v. Ivey*, 162 Miss. 471, 139 So. 615; *Coverstone v. Davies*, 38 Cal.(2d) 315, 239 P.(2d) 876.

The rule announced by this Court in *Draper v. U. S.*, *supra*, is as follows:

> "In dealing with probable cause, • • • as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. • • • Probable cause exists where 'the facts and circumstances within their (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief' that an offense has been or is being committed. • • •"

Preliminary to a tie-in of the facts with our position, we point up the common law requirement for arrest without warrant, as expressed by this Court in *Carroll v. U. S.*, 267 U.S. 132, 45 S.Ct. 280, 286, 69 L.Ed. 543:

> "In case of misdemeanor, a police officer, like a private person, has at common law no power of arrest-

ing without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence."

It is apparent, if, as determined by Mr. Justice Moore, "there is an abundance of testimony that both Boyers were inebriated and fighting drunk, that they were loud, noisy, profane and were disturbing the peace in a public place" that their condition and conduct were obvious to the appellees through the simple use of their senses; and, accordingly, "criminal offenses", "misdemeanors", and "breaches of the peace" were, in truth and in fact, being committed, renewed and continued within their presence; and, by reason of the premises, every requirement and demand of the common law, the statute and ordinance, and the expressed public policy of the state were met. This being so, the decision and judgment of the Supreme Court of Colorado rests entirely on an adequate and complete non-federal basis.

II. THE PURPORTED CHALLENGE TO THE VALIDITY AND CONSTITUTIONALITY OF THE "ARREST - WITHOUT - WARRANT" STATUTE AND ORDINANCE WAS NOT TIMELY, PROPERLY OR ADEQUATELY RAISED.

Attention is called to the opinion of Mr. Justice Moore, reproduced as Appendix "A" to the Jurisdictional Statement, and particularly to pages 25 and 29 thereof, for the purpose of illustrating the sole and only assignments of error or specification of points urged by the appellants

in the Supreme Court of Colorado in their attempt to gain reversal of the judgments of the Trial Court. It will be noted that Mr. Justice Moore specifically quotes the assignments and grounds urged for reversal and meets and determines each of them in the opinion. For the purposes of this argument under this Subdivision II, we point up and call attention to the "Summary" of appellants' argument, as contained in their brief and reproduced herein as Appendix "2". The Summary of Argument is made mandatory by subdivision c(4) of Rule 115 of the Colorado Rules of Civil Procedure, Volume 1, page 113, *Colorado Revised Statutes*, 1953. Neither the pleadings, which frame the issues to be tried, nor the motions for new trial, nor the briefs of appellants, nor the oral arguments offered in support thereof made challenge, directly or indirectly, to the constitutionality of either the statute or the ordinance. We call attention to the fact, however, that in paragraph 1 of the appellants' Petition for Rehearing, for the first time in the proceeding, complaint is made with respect to the validity or constitutionality of the statute and ordinance. Incidentally, but significantly, Rule 118 of the Colorado Rules of Civil Procedure prohibits the appellees from making answer, either by brief or by argument, thereto.

Under this state of the Record, we respectfully suggest to the Court that it lacks jurisdiction to review the final judgment of the Supreme Court of Colorado. *Herndon v. Georgia*, 79 L.Ed. 1530, 295 U.S. 441, 55 S.Ct. 794. *Bloeth v. State of New York*, 82 S.Ct. 661, 369 U.S. 133, 7 L.Ed.(2) 780, sets forth the rule as follows:

> "It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion

for reargument. In such circumstances, it is clear that this Court would be without jurisdiction to consider them."

See also *Radio Station WOW v. Johnson*, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092; *Hulbert v. City of Chicago*, 26 S.Ct. 617, 202 U.S. 275, 50 L.Ed. 1026; *Miller v. Texas, supra.*

Finally, we suggest that the Record in the instant case is absolutely void of the appellants' compliance with Rule 22 of the rules of the Trial Court, reproduced herein as Appendix "1". It is respectfully suggested that, for obvious reasons, strict compliance with the rule is prerequisite to a proper presentation of the issue to the trial and the appellate courts of Colorado.

III. THE SUPREME COURT OF COLORADO DID NOT EXPRESSLY PASS ON THE CONSTITUTIONALITY OF THE "ARREST-WITHOUT-WARRANT" STATUTE AND ORDINANCE.

The present application for review is bottomed upon Title 28 *U.S.C.* 1257(2), which provides that final judgments rendered by the highest court of a state may be reviewed by the Supreme Court when: "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution • • • and the decision is in favor of its validity." Applications for appeals under the statute are conditioned, as this Court has stated in *Honeyman v. Hanan*, 300 U.S. 14, 57 S. Ct. 350, 81 L.Ed. 476, as follows:

"Before we may undertake to review a decision of

> the court of a state it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause."

See also *Lynch v. New York, supra.* We believe it sufficient for the purposes of this argument to say that a physical examination of the opinion of the Supreme Court of Colorado, reproduced as Appendix "A" to appellants' Jurisdictional Statement, will reveal that the State Court did not expressly pass on the validity or the constitutionality of either the challenged "arrest-without-warrant" statute or ordinance; and, accordingly, the requirements of the statute by which appellants seek to invoke the jurisdiction of this Court have not been met. Indeed, as we have pointed up hereinabove, the decision could very well be based upon the common law of arrest, independent of the challenged legislation.

IV. THE CHALLENGE TO THE BODY EXECUTION STATUTE OF THE STATE OF COLORADO IS PREMATURE, RAISES NO JUSTICIABLE ISSUE, AND IS MOOT.

Reference is made, for the factual basis of this portion of the argument, to the Orders, issued by Mr. Justice Byron R. White on May 8, 1964, upon the application for stay of execution by the appellants. These Orders are reproduced as Appendixes "3" and "4" to the Motion to Dismiss. With respect to the appellant, Winston P. Boyer, the Order provides that he "is relieved from this filing of a bond, providing he immediately files in the Supreme

Court of Colorado an affidavit as to such inability and satisfies that Court as to the truth of said affidavit." As an alternative, it requires that this appellant file a surety bond in the sum of $30,000. Notwithstanding the Order, this appellant has wholly failed to supply the requisite affidavit or file the required bond. However, the Record is clear that he has not been in anywise subjected to the provisions of the challenged "body judgment" statute. Indeed, it is respectfully suggested that this particular appellant did, upon the order of the Trial Court, post with the Clerk of that Court his bond, secured by substantial real property situate in the State of Utah and corporate stock, the value of which remains undetermined. That bond is now in full force and effect.

With respect to George Boyer, the Order required that he post a surety bond in the sum of $35,000, subject to approval by the State Court. The Record here indicates that this appellant complied fully with the Order; and, accordingly, no writ of execution against his body has been issued. Under the circumstances, since the bond exceeds the amount of the judgments, interest and costs to be taxed, by the very terms of the statute and the order of the Trial Court issued thereunder, as well as the undertaking, his complaint of threatened imprisonment under the challenged statute will never come to pass. (See admissions at page 17 of Jurisdictional Statement.) As to the appellant, George Boyer, accordingly, the issue is moot.

As to the appellant, Winston Boyer, at the very most, it is premature. Especially is this true since he is, and at all times pertinent hereto, has been a resident of the State of Utah, where execution against his body under the Colorado statute cannot reach him. Accordingly, we respectfully suggest that, under the decisions of this Court,

this phase of the application for review raises no justiciable issue. See *Poe v. Ullman*, 367 U.S. 497, 6 L.Ed.(2d) 989, 81 S.Ct. 1752, where this Court announced that:

> "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. *Parker v. County of Los Angeles*, 338 U.S. 327, 333, 94 L.Ed. 144, 147, 70 S.Ct. 161. See also *Liverpool N. Y. & P. S. S. Co. v. Emigration Comrs.*, 113 U.S. 33, 39, 28 L.Ed. 899, 901, 5 S. Ct. 352.
>
> "The various doctrines of 'standing' 'ripeness' and 'mootness' which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations — each having its own 'varied application' of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed or immediately threatened with harm, by the challenged action. *Sterns v. Wood*, 236 U.S. 75, 59 L.Ed. 475, 35 S.Ct. 229; *Texas v. Interstate Commerce Com.*, 258 U.S. 158, 66 L.Ed. 531, 42 S.Ct. 261; *United Public Workers v. Mitchell*, 330 U.S. 75, 89, 90, 91 L.Ed. 754, 766, 767, 67 S.Ct. 556."

Further, it is now respectfully suggested that it is fundamental that the power of the state to regulate or prescribe the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control and does not in anywise contravene either the Fifth or the Fourteenth Amendments to the Constitution of the United States. In this regard, we ask the Court to consider the following statement found in *The Constitution of The United States of America, Anno-*

tated, Government Printing Office, 1938 Edition, Official Printing of the Seventy-fourth Congress, Second Session, Document No. 232, published by the Legislative Reference Service, Library of Congress, page 912, as follows:

> "The due process clause of the Fourteenth Amendment does not control mere forms of procedure in the State courts or regulate practice therein. (*Holmes v. Conway*, 241 U.S. 624, 631; *Louisville & N. R. Co. v. Schmidt*, 177 U.S. 230, 236). The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice be not unreasonable or arbitrary, and the procedure it adopts satisfy the constitutional requirements of reasonable notice and opportunity to be heard. (*Hardware Dealers Mut. F. Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158). Or, in the language of Justice Cardozo, a state is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (*Snyder v. Massachusetts*, 291 U.S. 97, 105.)' * * * The Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method or procedure adopted gives reasonable notice and affords fair opportunity to be heard before the issues are decided (*Iowa C. R. Co. v. Iowa*, 160 U.S. 389, 393; *Honeyman v. Hanan*, 302 U.S. 375).

> The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the constitution. (*Jordan v. Massachusetts*, 225 U.S. 167, 176.)"

V. CONCLUSION.

For the reasons hereinabove stated, it is respectfully submitted that the Motion to Dismiss is good and that the application for review should be denied. The statute and ordinance now the subject of challenge are, in every respect, valid and constitutional; the verdict of the jury and the judgments entered thereon by the trial and appellate courts of Colorado are, in every respect, in accordance with the law and the facts established; and, accordingly, we pray that the present proceeding be denied and dismissed and, if necessary, the judgments be, in all respects, affirmed.

Respectfully submitted,

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Denver, Colorado

Attorneys for Appellees

Appendix "1"

RULE 22

Notice of Claim of Unconstitutionality

(a) If, at any time prior to the trial of any proceeding a party attacks the validity or constitutionality of a municipal ordinance, franchise or charter provision of any Colorado municipality, that party shall promptly serve on either the municipality's attorney or its mayor copies of all pleadings filed in the action. Service may be made either by personal service or by certified or registered mail with return receipt requested.

(b) If, at any time prior to the trial of any proceeding, a party attacks the validity or constitutionality of any Colorado statute, or any rule or regulation of any state agency, that party shall promptly serve a copy of all pleadings on the attorney general of this state.

Appendix "2"

SUMMARY OF THE ARGUMENT

The trial court erred in failing to grant Defendants' (Plaintiffs in Error) Motion and Amended Motion for New Trial. The grounds stated in the Motion and Amended Motion for New Trial and relied upon by the Plaintiffs in Error (Defendants George and Winston Boyer) in seeking a reversal of the judgments against them, entered by the district court, are as follows:

I. The trial court erred in failing to submit to the jury the issues of whether or not Elkins and Bullock lawfully arrested George and Winston Boyer and whether or not George and Winston Boyer had a right to resist such arrests. The court erred in giving instructions Nos. 1, 7-11, 20 and 24, which, taken together, instructed the jury that the arrests were lawful and that the jury may find the Defendants guilty of malicious assault, and the court erred in failing to give Defendants' tendered instructions Nos. 1-9, inclusive, which instructions pertained to the legality of the arrests and the right of the Defendants to forcefully resist unlawful arrest. The court further erred in dismissing Defendants' counterclaims when there was an issue as to whether Plaintiffs Elkins and Bullock unlawfully arrested and imprisoned the Defendants.

A. Officers Elkins and Bullock acted in abuse of their authority and arrested George and Winston Boyer unlawfully. The arrests made without warrants were unlawful unless *in fact* crimes had been committed by George and Winston Boyer.

B. George and Winston Boyer had the right to resist the unlawful arrest with force.

C. The issue of whether or not George and Winston Boyer were lawfully arrested was for the jury's determination. There was sufficient conflict in the evidence on the issue of false arrest as to require that such controversial issue be submitted to the jury.

II. The damage verdicts returned by the jury were excessive and unreasonable in relation to the alleged injuries incurred by the Plaintiffs, were unsupported by the evidence, and bore no relation to *proximate cause.*

III. The Defendants were deprived of a fair trial by reason of improper opening statements on the part of Plaintiffs' counsel.

IV. Chapter 77, Article IX, Section 3, of the Colorado Revised Statutes, as applied to George and Winston Boyer deprives these Defendants of equal protection of the law as guaranteed to them by the United States Constitution.

Appendix "3"

SUPREME COURT OF THE UNITED STATES

No....., October Term, 1963

WINSTON P. BOYER, Appellant,

vs.

RICHARD L. ELKINS AND JAMES B. BULLOCK

ORDER

UPON CONSIDERATION of the application of counsel for the appellant and of the opposition of the appellees thereto,

IT IS ORDERED that the execution and enforcement of the judgments of the District Court for the City and County of Denver, State of Colorado, as affirmed by the Supreme Court of Colorado, be, and they are hereby stayed, pending the timely notation and perfection of an appeal to this Court from the Supreme Court of Colorado and of the final disposition of such appeal by this Court.

The application of counsel for the appellant alleges that in view of the appellant's financial position, he is unable to furnish bond to guarantee the payment of these judgments in the event of an affirmance of such judgments by this Court. Under these circumstances, the appellant is relieved from the filing of a bond provided he immediately files in the Supreme Court of Colorado an affidavit

as to such inability and satisfies that Court as to the truth of such affidavit. Should such an affidavit not be filed or if filed not meet with the approval of the Supreme Court of Colorado, then this stay is conditioned upon the posting and approval of a good and sufficient surety bond in the sum of Thirty Thousand Dollars ($30,000.00). Said bond is to be posted with and approved by the Supreme Court of Colorado, or a Judge thereof, and when so posted and approved, is to be filed with the Clerk of said Court.

/s/ BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 8th
day of May, 1964.
(Seal)

Appendix "4"

SUPREME COURT OF THE UNITED STATES

No..... ....., October Term, 1963

GEORGE T. BOYER, Appellant,

vs.

RICHARD L. ELKINS AND JAMES A. BULLOCK

ORDER

UPON CONSIDERATION of the application of counsel for the appellant and of the opposition of the appellees thereto,

IT IS ORDERED that the execution and enforcement of the judgments of the District Court for the City and County of Denver, State of Colorado, as affirmed by the Supreme Court of Colorado, be, and they are hereby stayed, pending the timely notation and perfection of an appeal to this Court from the Supreme Court of Colorado and of the final disposition of such appeal by this Court. Such stay is conditioned upon the posting and approval of a good and sufficient surety bond in the sum of Thirty-five Thousand Dollars ($35,000.00). Said bond is to be posted with and approved by the Supreme Court of Colorado, or a Judge thereof, and when so posted and approved, is to be filed with the Clerk of that Court.

/s/ BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 8th
day of May, 1964.
(Seal)